

(1996) 04 AHC CK 0136

Allahabad High Court

Case No: Criminal Miscellaneous Bail Application No. 3927 of 1996

Arif Khan (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: April 15, 1996

Acts Referred:

- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 42(1), 42(2), 50

Citation: (1996) 20 ACR 480

Hon'ble Judges: S.K. Phaujdar, J

Bench: Single Bench

Advocate: V.C. Tiwari, Manish Tiwari and Ashwini Kumar Awasthi, for the Appellant;
A.G.A., for the Respondent

Final Decision: Dismissed

Judgement

S.K. Phaujdar, J.

The matter was heard on 12.4.1996 and orders have been reserved for today.

2. Bail was pressed firstly on the ground that Section 42(1) of the N.D.P.S. Act, was not complied with inasmuch as the information received from the informer was not recorded in writing. Reliance was placed on the decision of the Supreme Court in State of Punjab v. Balbir Singh 1994 ACC 351, to say that the provisions are mandatory and the failure to comply with the requirements of Section 42(1) would vitiate the trial and, accordingly, there was no Justification in detaining the applicant till the end of the trial.

3. When a judgment is read as a precedent, it is necessary to read the whole of the judgment and not a stray line or paragraph in which some opinion is expressed. The judgment of the Supreme Court in the case of Balbir Singh (supra), while discussing the provisions of Section 42(1), no doubt expresses an opinion as relied upon by the learned counsel. But in the subsequent paragraphs of the judgment, the Supreme

Court has set out the conclusions one after another. The last paragraph at the right hand column of page 364 of this report, which extends to the next page 365, may be quoted:

Under Section 42(2), such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision, the same affects the prosecution case. To that extent, it is mandatory. But if there is delay, whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

4. The case at our hand is one where, in the course of an usual night round, the empowered officer gets an information from an informant that two persons were bringing smack. An immediate raid was arranged and the search was conducted after due observance of Section 50 of the N.D.P.S. Act. The facts alleged in the F.I.R. indicate that the empowered officer had no time to lose in arranging the raid to apprehend the drug trafficker. The information so received from the informer was in fact reduced into writing in the seizure memo itself. The sufficiency of this writing is a question of fact to be determined at the trial only and it may not be stated at this stage to be an absolute or total non-compliance of the provisions of Section 42(1) and in view of the conclusion of the Supreme Court in the aforesaid judgment of Balbir Singh, the sufficiency or otherwise of this compliance may not be judged at this stage and must be left as a question of fact to be determined at the trial.

5. It may be necessary here to make out a difference between the provisions of Section 42(1) and Section 50 of the N.D.P.S. Act, both of which, in the opinion of the Supreme Court, are mandatory, Section 50 gives a valuable right to the accused to get himself searched not by the raiding officer but before a Magistrate or a gazetted officer and the interpretation of law is now an established one that the accused must be told prior to his search by the raiding officer that he had the option to get himself searched before a Magistrate or a gazetted officer. Denial of this right to the accused affects the very search itself and, consequently affects the trial. Section 42(1), however, is only a procedural safeguard to avoid abuse of the provisions by the raiding officers. No doubt, the observance of this provision is also mandatory, but as explained in the conclusions of the Supreme Court in the judgment Balbir Singh's case (supra), only the total non-compliance of the provisions would affect the prosecution and whether there is total compliance or not is a question of fact, as observed in this order. This question of fact may be determined at the trial only. It is worth nothing that the judgment of the Supreme Court was recorded in the case of Balbir Singh in the course of an appeal. The other judgment relied upon by the applicant (1995 HVD 1) is also one in the course of an appeal where also the court had all the facts before it and had the opportunity of determining a question of fact. The application may not, therefore, be granted only on the ground of alleged non-observance of Section 42(1) of the N.D.P.S. Act.

6. The application was further pressed on the ground that when the searching officer was not carrying a sophisticated balance, he could not have indicated the exact weight of the materials to fractions of grams. This argument may also fail as the weights have been given only in approximate terms and not in exact figures. The general diary (Annexure-2 to the bail application) is only a subsequent report written after the seizure memo-curn-F.I.R. At this stage, the F.I.R. would be given more weight than the subsequent general diary.

7. In the circumstances, the present application for bail stands rejected at this stage.